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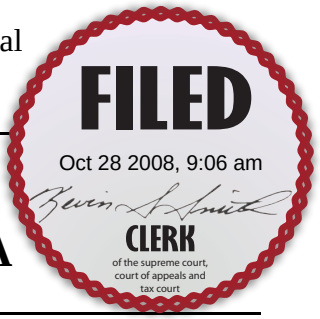

IN THE COURT OF APPEALS OF INDIANA

BRIAN WAGNER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A02-0803-CR-212
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Donald C. Johnson, Judge
Cause No. 79D01-0703-FA-6

October 28, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Brian Wagner pled guilty under an open plea to Class B felony aggravated battery and Class A misdemeanor resisting law enforcement and was sentenced to fifteen years, with ten years executed in the Department of Correction and five years on probation, with three of those years in community corrections and two years on supervised probation. On appeal, he argues that the trial court abused its discretion in recognizing his lack of insight into his behavior as an aggravating circumstance and in failing to recognize his guilty plea and unlikelihood to reoffend as significant mitigating circumstances. Wagner also contends that his sentence is inappropriate in light of the nature of the offenses and his character. Concluding that the trial court did not abuse its discretion in its recognition of aggravators and mitigators and that Wagner's sentence is not inappropriate, we affirm.

Facts and Procedural History

On Friday, February 23, 2007, Wagner finished his Purdue University class and returned to his West Lafayette apartment to make plans for the weekend. While there, he consumed approximately five beers. Wagner and his roommates then went to a local sports bar for drinks and drank two Long Island Iced Teas. After engaging in a verbal confrontation with a roommate, Wagner left.

Wagner joined his girlfriend and her roommate at a party hosted by Mark Lovelace, another Purdue University student. Wagner helped himself to beer. A verbal altercation developed between Wagner and another guest, and Lovelace asked Wagner to leave. On his way out, Wagner dumped a glass of beer onto Lovelace's furniture.

Wagner left the residence and was upset to discover that his girlfriend was embarrassed about his behavior. He went home to his apartment, where he retrieved a hunting knife, and began walking back toward Lovelace's residence. Along the way, Wagner called his girlfriend and left a voice message telling her that he was probably going to stab someone at Lovelace's residence. Wagner then spotted Lovelace walking with friends on a street. He approached Lovelace, stabbed him twice in the abdomen, and then ran away. Wagner subsequently ran from police officers responding to a 911 call about the stabbing. Officers apprehended him, and he directed them to the knife, which he had discarded while running. As a result of the stabbing, Lovelace lost approximately eighteen inches of his intestine.

The State charged Wagner with attempted murder, a Class A felony,[1] Class B felony aggravated battery,[2] and Class A misdemeanor resisting law enforcement.[3] Pursuant to a plea agreement, Wagner pled guilty to Class B felony aggravated battery and Class A misdemeanor resisting law enforcement, and the State dismissed the attempted murder charge. Appellant's App. p. 23. The plea agreement left sentencing open to the discretion of the trial court and consented to judicial fact-finding of aggravating and mitigating circumstances. *Id.* At the conclusion of Wagner's sentencing hearing, the trial court identified multiple aggravating and mitigating circumstances. Specifically, the court found the following aggravators:

[1] Ind. Code § 35-41-5-1; Ind. Code § 35-42-1-1.

[2] Ind. Code § 35-42-2-1.5(2).

[3] Ind. Code § 35-44-3-3(a)(3).

> [T]he victim recommends aggravation of the sentence. The use of a deadly weapon and the way it was used is an aggravator. I do believe that you lack tremendous insight into who you are and to how you behave and to how you use alcohol and the effect it has on you. That's made you a danger. You're like a time bomb. And nobody knows why you're like that. You don't know why you stabbed this young man twice. You don't know. You felt like you had to. You don't know. So it's hard for us to know. And that kind of attitude makes you a danger to the community. . . . And I have a sense that whatever it is that if you continue to drink or you don't deal with this substance abuse problem that you have and this anger problem that's, for a long period of time looks like it might not be directed at anybody, it's problematic. . . . And [the victim] had a large part of his colon, was it, what, eighteen (18) inches or so, removed? That's gonna cause him problems over the years. He's gonna have to live with that. There's a permanency to that and psychologically it changed his life.

Tr. p. 72-73. The court found the following mitigators:

> [T]he Court notes that there is no criminal history. The Court credits [Wagner] for being just twelve hours short of getting a degree. Most [of] the people I see don't even graduate from high school. You are a good worker. I believe you are remorseful. You have voluntarily, you've been, you've gone through some treatment. I don't know what you've done on the Twelve Steps or what you're doing. You paid partial restitution. . . . You have strong family support. As to low future risk, that's what the psychiatrist, or the psychologist said. I don't know about future risk. It says you're at low future risk if you don't drink, I think. Whether you drink or not, I don't know.

Id. at 71-72. Finding that the aggravators outweigh the mitigators, the trial court sentenced Wagner to fifteen years, with ten years executed in the Department of Correction and five years on probation, with three of those years in community corrections and two years on supervised probation. Appellant's App. p. 13. Wagner now appeals.

Discussion and Decision

Wagner challenges his sentence on appeal. He argues that the trial court abused its discretion in recognizing his lack of insight into his behavior as an aggravating

circumstance and in failing to recognize his guilty plea and unlikelihood to reoffend as significant mitigating circumstances. He also contends that his sentence is inappropriate in light of the nature of the offenses and his character.

I. Abuse of Discretion

Sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007). An abuse of discretion occurs if the decision is clearly against the logic and effect of the facts and circumstances before the court or the reasonable, probable, and actual deductions to be drawn therefrom. *Id.* We review the presence or absence of reasons justifying a sentence for an abuse of discretion, but we cannot review the relative weight given to these reasons. *Id.* at 491. One way in which a court may abuse its discretion is by recognizing an aggravating circumstance that is not supported by the record. *Id.* at 490. Another way is by entering a sentencing statement that omits mitigating circumstances that are clearly supported by the record and advanced for consideration. *Id.* at 490-91. However, a trial court is not obligated to accept a defendant's claim as to what constitutes a mitigating circumstance. *Rascoe v. State*, 736 N.E.2d 246, 249 (Ind. 2000).

Wagner contends on appeal that the trial court abused its discretion in recognizing his lack of insight into his behavior as an aggravating circumstance. He also contends that the trial court abused its discretion in failing to recognize as significant mitigating circumstances his guilty plea and the unlikelihood that he will reoffend. We address each argument in turn.

A. Lack of Insight

Wagner first argues that the trial court abused its discretion in recognizing his lack of insight into his own behavior as an aggravating circumstance. At the conclusion of the sentencing hearing, the trial court found that Wagner lacks insight into his alcohol abuse and explained:

> I do believe that you lack tremendous insight into who you are and to how you behave and to how you use alcohol and the effect it has on you. That's made you a danger. You're like a time bomb. . . . You don't know why you stabbed this young man twice. . . . You felt like you had to. . . . And that kind of attitude makes you a danger to the community.

Tr. p. 72. On appeal, he contends that this is an improper aggravator and that the evidence in the record does not support a finding that he lacks insight into his behavior.

As an initial matter, in a one-sentence argument, Wagner contends that a defendant's lack of insight is not a proper aggravating circumstance: "The defendant would argue that a lack of insight in this situation is an improper aggravating factor in and of itself." Appellant's Br. p. 8. However, he follows up with no analysis or citation to authority, and, as such, this argument is waived. *See* Ind. Appellate Rule 46(A)(8)(a). Waiver notwithstanding, we observe that Indiana Code § 35-38-1-7.1(c) provides that trial courts have wide discretion in identifying aggravating circumstances. We perceive no error in the trial court's consideration of whether Wagner lacks insight into his behavior.

Further, the evidence in the record supports the trial court's finding that Wagner lacks insight into his own behavior. Although Wagner points to portions of his testimony during which he identified elements of his emotions leading up to the stabbing and

mental health records detailing his therapy and evaluations, the record supports the trial court's finding that Wagner has an alcohol abuse problem that he has not adequately identified and addressed. During the sentencing hearing, the trial court repeatedly expressed its concern to Wagner that it did not understand his motivation for stabbing Lovelace and the level of violence he displayed during the incident. The court therefore asked Wagner to explain the cause of his actions, and the following exchange ensued:

> **BY THE COURT:** Why did you do it? Why did you stick the knife in him? I want to know why. Don't tell me you don't know. That just doesn't make sense. You know, our behavior is controlled by what we think. What we think determines how we behave.
>
> *****
>
> **BY THE DEFENDANT:** It takes more than one simple, quick answer.
> **BY THE COURT:** Go ahead. I've got time.
> **BY THE DEFENDANT:** I'm gonna have plenty of it after this.
> **BY THE COURT:** You give me, you answer my question. Now is a good time to answer my question.
> **BY THE DEFENDANT:** Yes, sir.
> **BY THE COURT:** Why did you do it?
> **BY THE DEFENDANT:** Uh, in the past I've expressed anger in [an] unhealthy manner.
> **BY THE COURT:** You've knifed other people? What do you mean unhealthy ways? This is more than unhealthy.
> **BY THE DEFENDANT:** Yeah. I just lost my temper.
> **BY THE COURT:** Well, tell me about it.
> **BY THE DEFENDANT:** Yeah.
> **BY THE COURT:** Tell us about it.
> **BY THE DEFENDANT:** All right. And so, uh, I've had issues with disrespect in the past and that night I felt that Mark was being disrespectful to my friends and, and that his friends were being disrespectful to me.
> **BY THE COURT:** How?
> **BY THE DEFENDANT:** Uh, there was a part of the party where his buddy, I guess the verbal confrontation he mentioned earlier, uh, you know, I'm, I'm drunk in my, and impaired. So I, you know, okay, his buddy called me a Jerry O'Neals . . . and I took offense to that. I don't know why, but I did. I felt it was disrespectful and he, I had a shirt on, I had a jacket on that said Jerry and my jersey said O'Neals and I thought that was disrespectful. When I came in nobody – obviously I wasn't invited – so I felt why everybody was giving me a cold shoulder and being odd to me.

> You know, I just thought it was a party, we were gonna hang out. But, uh, I had some beers and then I guess they wanted me to leave. He kept calling [a female partygoer] "Taylor Hanson" and, you know, I just thought he was being disrespectful.
>
> And for some reason, it doesn't excuse me, but I thought I needed to show him. I kind of had a little bit of an argument with my girlfriend. She was embarrassed with me for yelling at Mark after it and she ran away and hid and turned off her phone. And for some reason, that made me mad. And so I just got even more mad. And for some reason I needed to take it out on Mark. And I don't know why, I just did.

Tr. p. 50-52. Upon review of Wagner's own testimony, it is apparent that the trial court's finding that he lacks insight into the effect of alcohol upon his behavior is supported by the evidence. The trial court did not abuse its discretion in recognizing Wagner's lack of insight into his own behavior as an aggravating circumstance.

B. Guilty Plea

Wagner next contends that the trial court abused its discretion in failing to recognize his guilty plea as a significant mitigating circumstance. Wagner correctly points out that a defendant who pleads guilty generally deserves "some" mitigating weight to be afforded to the plea. *Anglemyer*, 875 N.E.2d at 220 (citing *McElroy v. State*, 865 N.E.2d 584, 591 (Ind. 2007)). However, our Supreme Court has recognized that a trial court does not necessarily abuse its discretion by failing to recognize a defendant's guilty plea as a significant mitigating circumstance. *Id.* at 221. Instead, a trial court is only required to identify mitigating circumstances that are both significant and supported by the record, and "a guilty plea may not be significantly mitigating when . . . *the defendant receives a substantial benefit in return for the plea*." *Id.* (emphasis added) (citing *Sensback v. State*, 720 N.E.2d 1160, 1165 (Ind. 1999)).

Here, the State agreed to dismiss the charge of attempted murder, a Class A felony, in exchange for Wagner's guilty plea to Class B felony aggravated battery and Class A misdemeanor resisting law enforcement. Therefore, by entering into this plea agreement, Wagner avoided the twenty- to fifty-year sentence that goes along with a Class A felony. Ind. Code § 35-50-2-4. Indeed, the advisory term for a Class A felony is thirty years, which is fifteen years more than the sentence he received for his convictions.[4] Given the substantial benefit Wagner received in return for his guilty plea, we cannot say that the trial court improperly overlooked a significant mitigating circumstance. The trial court did not abuse its discretion by failing to recognize Wagner's guilty plea as a significant mitigating circumstance.

C. Unlikely to Reoffend

Wagner next contends that the trial court abused its discretion in failing to recognize as a mitigating circumstance that he is unlikely to reoffend. He argues that the evidence in the record does not support the trial court's rejection of this proposed mitigator.

A trial court may consider as a mitigating circumstance that a defendant's character and attitude indicate that the defendant is unlikely to commit another crime. Ind. Code § 35-38-1-7.1(b)(8). Wagner presented evidence from his therapist and other mental health experts in support of his claim that he is not likely to reoffend. On appeal,

[4] The State refers to the "presumptive" sentence that Wagner could have received for a Class A felony. Appellee's Br. p. 8. In 2005, the Indiana General Assembly replaced the former presumptive sentencing scheme with the current advisory sentencing scheme. *See* P.L. 71-2005 (eff. Apr. 25, 2005). Whether a sentence falls under the presumptive or advisory sentencing scheme has significant implications for a defendant appealing his or her sentence, *see generally Anglemyer*, 868 N.E.2d 482, and we caution the Attorney General's office to be more careful in its briefing.

he points to positive comments made about his personality and to Dr. Jeffrey Wendt's assessment that his substance abuse is in "sustained remission" and that "his probability for future acts of physical violence appears to be extremely low . . . ." Appellant's Br. p. 12 (citing Appellant's App. p. 66, 67). However, the trial court addressed Wagner's contention that he is unlikely to reoffend and rejected it, pointing to the condition of Dr. Wendt's assessment that Wagner omits from his quotation: "*if he is able to maintain sobriety*." Appellant's App. p. 67 (emphasis added). The trial court explained: "As to low future risk, that's what the psychiatrist, or the psychologist said. I don't know about future risk. It says you're at low future risk if you don't drink, I think. Whether you drink or not, I don't know." Tr. p. 71-72. This observation is supported by the record. As the trial court noted, Wagner failed to present documentation of his participation in an alcohol treatment program. *Id.* at 71 ("I don't know what you've done on the Twelve Steps or what you're doing."). The only evidence that Wagner no longer drinks are his own self-reports to mental health experts and testimony and letters from his family. Given the fact that Wagner's family was unaware of his alcohol abuse during college and his aggressive tendencies when drinking, the trial court was well within its discretion in deciding not to credit this evidence. The trial court did not abuse its discretion in rejecting Wagner's unlikelihood to reoffend as a mitigating circumstance.

II. Inappropriateness

Finally, Wagner argues that his fifteen-year sentence, with ten years executed in the Department of Correction and five years on probation, with three of those years in

community corrections and two on supervised probation, is inappropriate.[5] Although a trial court may have acted within its lawful discretion in imposing a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution authorize independent appellate review and revision of sentences through Indiana Appellate Rule 7(B), which provides that a court "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." *Reid v. State*, 876 N.E.2d 1114, 1116 (Ind. 2007) (citing *Anglemyer*, 868 N.E.2d at 491). The burden is on the defendant to persuade us that his sentence is inappropriate. *Id*. (citing *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)).

As for the nature of the offenses, Wagner became intoxicated and angry and was asked to leave a party to which he had not been invited. Upset by this, Wagner went home, retrieved a hunting knife, and started back toward the party, calling his girlfriend along the way to tell her that he would likely stab someone. Wagner then saw Lovelace, the person who had told him to leave the party, and stabbed him twice. Wagner fled from the scene. As a result of Wagner's actions, Lovelace, a college student, suffered very serious injuries. He lost approximately eighteen inches of intestine and underwent two

[5] The State responds to Wagner's inappropriateness argument with the following restatement of the issue: "The trial court did not abuse its discretion in sentencing Wagner because the nature of the crime compelled the levying of an enhanced sentence." Appellee's Br. p. 9. This conflates the two distinct standards of review that we employ when reviewing sentences. "As our Supreme Court has made clear, inappropriate sentence and abuse of discretion claims are to be analyzed separately." *King v. State*, 894 N.E.2d 265, 267 (Ind. Ct. App. 2008) (citing *Anglemyer*, 868 N.E.2d at 491). We therefore recently took the "opportunity to clarify that an inappropriate sentence analysis does not involve an argument that the trial court abused its discretion in sentencing the defendant." *Id*.

surgeries. Nothing about the nature of the offenses renders Wagner's sentence inappropriate.

As for the character of the offender, it is true that Wagner has no other criminal history and has stayed out of trouble and maintained employment since this tragic incident. Additionally, when he committed these offenses, he was close to graduating from college. However, Wagner has a history of becoming angry and acting out destructively, particularly when drinking, and he was aware of his behavior but did nothing to stop it. *See* Appellant's App. p. 42 (detailing destructive outbursts as recounted by Wagner). This culminated in a violent attack upon a fellow student that left the other young man gravely wounded. We cannot say that Wagner's character renders his sentence inappropriate.

We affirm the judgment of the trial court.

KIRSCH, J., and CRONE, J., concur.